

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SCOTT W. KAYS,

Plaintiff,

Case No. C14-913-TSZ-BAT

V.

CAROLYN W. COLVIN, Commissioner of
Social Security.

Defendant.

REPORT AND RECOMMENDATION

Scott W. Kays appeals the denial of his Disability Insurance Benefits application, seeking remand for further administrative proceedings. He contends the ALJ erred by (1) misevaluating the opinion of non-examining State agency doctor Diane Rubin, M.D., and (2) making a step four finding that was not supported by substantial evidence. As discussed below, the Court recommends the case be **REVERSED** and **REMANDED** for further administrative proceedings.

BACKGROUND

Following a hearing, the ALJ issued a final decision finding that from Mr. Kays's alleged disability onset date of December 31, 2008, through his date last insured of September 30, 2010, he was not disabled. Tr. 19-35. Utilizing the five-step disability evaluation process, the ALJ found that cirrhosis of the liver; hepatitis C; cardiac disorder; right knee degenerative joint

1 disease; cervical, thoracic, and lumbar degenerative disc disease; and gastrointestinal disorders
 2 were severe impairments that did not meet or equal the requirements of a listed impairment. Tr.
 3 22; *see* 20 C.F.R. § 404.1520; 20 C.F.R. Pt. 404, Subpt. P, App. 1. The ALJ also found that Mr.
 4 Kays had the residual functional capacity (“RFC”) to perform less than the full range of light
 5 work. Tr. 25-26. Based on the RFC and the testimony of a vocational expert (“VE”), the ALJ
 6 found Mr. Kays could perform past relevant work as a service writer/auto tire salesman. Tr. 31-
 7 32. Alternatively, the ALJ found Mr. Kays could perform jobs that exist in significant numbers
 8 in the national economy. Tr. 32. Therefore, the ALJ found Mr. Kays not disabled. Tr. 33.

9 DISCUSSION

10 A. The ALJ erred in evaluating Dr. Rubin’s opinion

11 In May 2011, Dr. Rubin opined that from June 2009 through September 2010, Mr. Kays
 12 had no physical limitations but needed to avoid concentrated exposure to vibration, fumes, odors,
 13 dusts, gases, poor ventilation, and hazards. Tr. 122-23. She also opined that he needed “close
 14 access to [a] bathroom due to [irritable bowel syndrome].” Tr. 123.

15 The ALJ gave Dr. Rubin’s opinion “some weight,” explaining:

16 Dr. Rubin assessed the claimant in April 2011 and concluded that
 17 he had no physical limitations. Dr. Rubin apparently did not
 18 consider the claimant’s degenerative disc disease and knee
 19 problems. As discussed above, the medical evidence shows that
 20 the claimant’s impairments cause functional restrictions that limit
 21 him to less than the full range of light work.

22 Tr. 31.

23 Mr. Kays argues the ALJ erred because he failed to evaluate Dr. Rubin’s opinion that Mr.
 24 Kays needed close access to a bathroom, and the RFC does not include any such limitations.
 25 The Court agrees. The ALJ did not mention Dr. Rubin’s opinion regarding bathroom access or
 26 provide any reason why that opinion was not incorporated into the RFC. This was error. *See*

1 SSR 96-8p (“If the RFC assessment conflicts with an opinion from a medical source, the
2 adjudicator must explain why the opinion was not adopted.”). And because the hypothetical
3 presented to the VE did not include a need for close access to a bathroom, the ALJ’s error was
4 harmful. *See Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012) (error is harmful where it
5 affects the ultimate nondisability determination); *Matthews v. Shalala*, 10 F.3d 678, 681 (9th Cir.
6 1993) (a VE’s testimony based on an incomplete hypothetical lacks evidentiary value) (citing
7 *DeLorme v. Sullivan*, 924 F.2d 841, 850 (9th Cir. 1991)).

8 The Commissioner nevertheless argues that the ALJ properly rejected Dr. Rubin’s
9 opinion in favor of the opinion of Arthur Lorber, M.D., the medical expert who testified at the
10 hearing. *See Sousa v. Callahan*, 143 F.3d 1240, 1244 (9th Cir. 1998) (“The Commissioner may
11 reject the opinion of a non-examining physician by reference to specific evidence in the medical
12 record.”). The Commissioner also maintains that the ALJ did not need to discuss every aspect of
13 Dr. Rubin’s opinion and properly considered it by explaining the weight assigned. *See* 20 C.F.R.
14 § 404.1527(e) (“Unless a treating source’s opinion is given controlling weight, the administrative
15 law judge must explain in the decision the weight given to the opinions of a State agency
16 medical or psychological consultant”).

17 The Court is not persuaded. Although an ALJ’s decision need not be a model of clarity,
18 the Court must be able to reasonably discern the ALJ’s path. *See Molina*, 674 F.3d at 1121. The
19 ALJ omitted any discussion of Dr. Rubin’s bathroom access opinion, and thus there is no path
20 between this opinion and Dr. Lorber’s opinion. The ALJ’s reference to Dr. Lorber’s contrary
21 opinion regarding limitations caused by Mr. Kays’s degenerative disc disease and knee problems
22 is insufficient to reject Dr. Rubin’s opinion regarding bathroom access, particularly because the
23 ALJ credited aspects of Dr. Rubin’s opinion by giving it “some weight.” Indeed, the

1 Commissioner's suggested interpretation of the ALJ's decision—that the ALJ intended to reject
 2 Dr. Rubin's bathroom access opinion by referring to Dr. Lorber's opinion regarding Mr. Kays's
 3 physical limitations—is no more probable than finding the ALJ intended to give weight to Dr.
 4 Rubin's bathroom access opinion but accidentally omitted it from the RFC. Given this
 5 ambiguity, remand is necessary for the ALJ to clarify his intent.

6 **B. The ALJ's step four finding**

7 Mr. Kays argues the ALJ erred at step four in finding he could perform his past relevant
 8 work. As this matter is being remanded for further consideration of Dr. Rubin's opinion, which
 9 may result in a different RFC finding and therefore new findings at steps four and five, it would
 10 be premature to address this argument now.

11 **CONCLUSION**

12 For the foregoing reasons, the Court recommends the Commissioner's decision be
 13 **REVERSED** and the case be **REMANDED** for further administrative proceedings pursuant to
 14 sentence four of 42 U.S.C. § 405(g). On remand, the ALJ should reevaluate Dr. Rubin's opinion
 15 regarding bathroom access, specifically consider the credibility of Mr. Kays's statements
 16 concerning his need to access a bathroom¹, and, as necessary, revise the RFC and proceed with
 17 steps four and five of the sequential evaluation process.

18 A proposed order accompanies this Report and Recommendation. Objections, if any, to
 19 this Report and Recommendation must be filed and served no later than **November 28, 2014**. If
 20 no objections are filed, the matter will be ready for the Court's consideration on **November 28**,

21 ¹ The Court does not recommend that the ALJ's adverse credibility finding be reversed; indeed, Mr. Kays did not
 22 raise this as an independent issue or otherwise show that the ALJ harmfully erred in his credibility finding. Nor
 23 does the Court suggest that the ALJ was required to independently reject each and every limitation Mr. Kays
 alleged. However, because the Court recommends that this case be remanded for reconsideration of one narrow
 issue—Dr. Rubin's bathroom access opinion—and because the ALJ did not specifically reject Mr. Kays's
 statements concerning his need to access a bathroom, the Court finds it appropriate for the ALJ on remand to
 consider the credibility of Mr. Kays's statements on this specific issue.

1 **2014.** If objections are filed, any response is due within 14 days after being served with the
2 objections. A party filing an objection must note the matter for the Court's
3 consideration 14 days from the date the objection is filed and served. Objections and responses
4 shall not exceed twelve pages. The failure to timely object may affect the right to appeal.

5 DATED this 13th day of November, 2014.

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7 BRIAN A. TSUCHIDA
8 United States Magistrate Judge
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